As soon as the bankruptcy proceedings against him had terminated in his favour, the plaintiff brought on his application for a commission to examine certain witnesses in India on his behalf before Raja Musa, Acting J., who was then at Seremban, and obtained an order for such a commission on the 16th of December, 1938. The first defendant did not proceed so expeditiously with his application for a letter of request, but waited until the learned Registrar had heard these two applications for an order upon the plaintiff to give security for costs before he took any further steps to obtain an order for such a letter. Eventually, on the 27th of February, 1939, the first defendant obtained an order for a commission to issue for the examination of certain witnesses on his behalf in India. Both these commissions have now been issued, and this case will be ready for trial as soon as the depositions taken thereunder are received from India.

My examination of the circumstances of this case, so far as they can be ascertained from the proceedings in the suit itself and the affidavits in evidence on these two applications for security for costs, is now complete. I hold, in agreement with the Indian case of *In the goods of Premchand Moonshee,* which I have already cited, that the power given to a Judge by section 369 (i) of the Civil Procedure Code "is discretionary, and one which the Court ought or ought not to exercise according to the circumstances of each case." Upon a prolonged and careful consideration of all the circumstances of this case, so far as the same are known to me, I have come to the conclusion that I ought not to exercise my discretionary power under section 369 (i) of the Civil Procedure Code in the defendants' favour. The suit itself appears to be a *bona fide* suit, and it is certainly one which raises grave and important issues for the determination of the Court. There has been great delay in making these applications, for which the plaintiff is in no wise responsible. Lastly, there is reason to suppose that these applications, and certain other legal proceedings, have been brought rather for the purpose of embarrassing the plaintiff in his conduct of this suit than for any purpose which may serve the true ends of justice.

This appeal from the learned Registrar's decision of the 11th of March, 1939, is therefore dismissed, and with costs.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) AND TERRELL, J.A.

May 22, 1939.

LIOW CHOW AND ANOTHER

vs.

PUBLIC PROSECUTOR.

(NEGRI SEMBILAN CRIMINAL APPEAL No. 4 of 1939)

Criminal Procedure Code (Cap. 6), Sections 316, 321, 323—sentences only to be altered on appeal if illegal or manifestly excessive or inadequate.

The sentence of a Court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. **Abdul Rahman v. Public Prosecutor (Johore)** 7 M.L.J. 219 approved.

REFERENCE to the Court of Appeal from the Court of a Judge under Courts Enactment (Cap. 2) S. 45 A.

The Appellants were not represented and did not appear.

Adrian Clark, Public Prosecutor, in person.

The judgment of the Court of Appeal was as follows:—

The appellants were convicted of riot and were sentenced to five months R.I.

The evidence shewed that the appellants were members of a mob of 200 or 300 who attacked the police and the appellants were among those who stoned the police with a view to rescuing from police custody two rioters who had been arrested.

On appeal to the Court of a Judge the sentence was reduced to three months R.I.

Sections 307, 316 and 323 gives power to the Appellate Court to vary sentences. Whatever may be the true meaning of section 321 it clearly indicates that a sentence should not be set aside unless it is wrong. Probably, the words "against the weight of evidence" as used in connection with sentence means no more than that the sentence should accord with the gravity of the particular offence as disclosed in the evidence.

The learned judge says "judges exist for a variety of reasons and I rather think that the polishing of sentences must be one of them". The metaphor is an unhappy one. "Polishing" indicates minute

corrections rather than substantial alterations when the sentence is unjustly severe or unjustly lenient having regard to the gravity of the facts proved.

In *Abdul Rahman v. Public Prosecutor of Johore* 7 M.L.J. 219 the Court of Appeal of Johore indicated that an Appellate Court would reduce or enhance sentences when, having before it all the material which the trial Judge had before him, it considers, having regard to all the circumstances of the case, that the sentence imposed was manifestly excessive or inadequate.

The sentence of the Court of first instance should not be altered unless the appellate Court considers the sentence unjust. An Appellate Court must reject "the lore of nicely calculated less or more" in matters of sentence. Before the sentence is altered it must be manifestly wrong, wrong either in the sense of being illegal or of being unsuitable to the proved facts and circumstances.

This Court has at the present sitting substituted a sentence of nine months R.I. for a small fine in a case of serious assault; it also reduced a sentence of four years to one of two years because the one sentence was manifestly insufficient and the other manifestly excessive.

In the present case the learned Judge appreciated the gravity of the offence. From the evidence and from the view taken by the learned Judge it does not appear that the sentence was manifestly excessive. We think the sentence imposed by the Magistrate ought not to have been reduced.

Had there been no appeal to a Judge the sentence originally imposed would have expired before the present appeal came on and the present judgment will not adversely affect the respondents.

Reference answered.

[APPELLATE CIVIL JURISDICTION]

AITKEN, J.

April 28, 1938.

THE PERAK RIVER HYDRO-ELECTRIC POWER COMPANY, LIMITED.

(Plaintiffs)

v.

CHEN YEW AND ANOTHER

(Defendants).

(PERAK CIVIL APPLICATION No. 9 of 1938)

Civil Procedure Code (Cap. 7) Sec. 8—Supreme Court and Court of Magistrate with extended jurisdiction—Jurisdiction.

There is no provision of law empowering a Registrar of the Supreme Court to reject a plaint for the sole reason that it could have been presented in a lower Court.

J. L. Woods for Plaintiffs.

Aitken, J.—This is an appeal from a refusal of the learned Assistant Registrar to admit a "Summary Procedure" plaint claiming $868/- from the above named Defendants. In refusing to admit the same he was following a decision of my learned predecessor in office, which I myself have hitherto accepted as correct.

That decision is based on Section 8 of the Civil Procedure Code, which enacts that "every suit shall be instituted in the Court of the lowest grade competent to try it", and on the fact that the Court of the first class Magistrate at Ipoh, when constituted by Mr. L. C. Simpson-Gray, may "hear and determine all suits within its local jurisdiction when the value in dispute does not exceed $1,000/-."

After listening to Mr. J. L. Woods for the Plaintiff-Appellant, and studying the relevant sections of the Civil Procedure Code, I have come to the conclusion that this plaint should be admitted for the following reasons:—

1. The words "shall be instituted" in S. 8 constitute a direction to the suitor, and are not imperative upon the Courts for whose benefit or convenience they are intended. Thus, this Section is a rule of procedure and not of jurisdiction; and it must not be construed as ousting the jurisdiction of a superior Court.

2. Since Section 49 of the Civil Procedure Code does not apply to the Supreme Court, there is no provision in that Code or anywhere else in our *corpus juris* empowering a Registrar of the Supreme Court to reject a plaint for the sole reason that it could have been presented in a lower Court.